

IN THE MATTER OF:

) DUE PROCESS HEARING  
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)

C. A.

NO. 06-17

**SUMMARY**

This case involves a student who is 11 years of age and had completed the 5<sup>th</sup> grade at the time of the hearing. The issue is whether the student, who has dyslexia, should be certified as eligible for, and be provided, special education services for the 6<sup>th</sup> grade. 20 U.S.C. § 1401 defines “child with a disability” as a child with health impairment or specific learning disability “who, by reason thereof, needs special education and related services.” 20 U.S.C. §1401(3)(A). It also defines “specific learning disability” as a “disorder” and the condition of “dyslexia” is specifically included as such “disorder”. However, an identified disability does not, by itself, entitle a student to special education services. The student must also be in need of special education services because of that disability.

This student began school by attending a city school and, towards the end of the 1<sup>st</sup> grade, a determination was made that she needed, and was eligible for special education. She had an IEP and did better in the 2<sup>nd</sup> and 3<sup>rd</sup> grades. The IEP team developed an IEP for 4<sup>th</sup> grade; but the student and family moved and she was enrolled in a county school to begin the 4<sup>th</sup> grade. A parent met with the county school principal and, after being assigned a 4<sup>th</sup> grade teacher, met with the teacher and discussed the student and her needs and the teacher and parent agreed that the teacher would provide all necessary services and the student would not be certified as a special ed student or provided an IEP. The 4<sup>th</sup> grade went well for the student and the parent and teachers did the same for the 5<sup>th</sup> grade at the county school. Before the end of the 5<sup>th</sup> grade, the parent became concerned that the 6<sup>th</sup> grade teachers (probably 6 of them) would not all provide necessary services so the parent requested an IEP be created to ensure that the necessary and appropriate services would continue to be provided for the 6<sup>th</sup> grade. However, after the parents’ request for an IEP, an appropriate IEP team was developed and determined that reevaluation testing needed to be

**BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION  
DIVISION OF SPECIAL EDUCATION**

**IN THE MATTER OF:**

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**NO. 06-17**

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**FINAL ORDER**

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Jack E. Seaman (4058)  
Administrative Law Judge  
2021 Richard Jones Road, Suite 350  
Nashville, Tennessee 37215-2874  
615/383-3332

## **FINAL ORDER**

Case No. 06-17

This proceeding arises pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. (IDEA). A stated purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). The instant case involves a student who is 11 years of age and had completed the 5th grade at the time of the hearing. The parents requested the Due Process Hearing stating the student has been denied certification by the current school system as learning disabled after the student has had special education services since the 1<sup>st</sup> grade through consultation only and classroom teachers have modified the student's work due to recognized dyslexia causing learning difficulties and the student has processing difficulty and reads and spells on a 2<sup>nd</sup> and 3<sup>rd</sup> grade level and will be entering the 6<sup>th</sup> grade. The proposed resolution is that the student be certified learning disabled with her dyslexia and that special education services be continued to increase the student's academic performance. The student is not currently certified as a special education student and has not been certified as such since enrolled in the current school system at the beginning of the fourth grade. The student was certified as a special education student and was receiving special education services at the school system attended before the parents moved and before the student began attendance at the current school system. Also, it is asserted that if the student is, or has been, receiving modification of any programs by classroom teachers at the current school system, it is not documented by the school system.

The due process hearing in this matter was first set to begin on May 31, 2006. Prior to the scheduled date for hearing in May it was continued in accordance with a joint request of counsel. On June 14 counsel for both parties again jointly requested continuance and the hearing was rescheduled. A Motion to

Dismiss and a Response to the Motion were filed shortly before the Due Process hearing and it was agreed that the issues in the Motion were essentially what the hearing involved and, because there had been numerous depositions and other evidentiary material prepared for the hearing, it was agreed that the hearing would be conducted and there would be no ruling on the Motion.

### **ISSUE**

The issue identified for determination is whether the student should be certified as eligible for, and be provided, special education services for the 6<sup>th</sup> grade.

### **POSITION OF THE PARTIES**

The parents maintain that the student should be certified as eligible for, and provided, special education services.

The school system maintains that it has made an appropriate determination that the student is not eligible for, and does not need to be provided, special education services.

### **THE DUE PROCESS HEARING**

Present at the Due Process Hearing for the Petitioner, Student/Parent, was student's mother and legal counsel. Present for the Respondent, School System, was the School System's Special Education Coordinator and legal counsel. Several witnesses and exhibits were presented at the due process hearing and all have been considered.

The mother and one additional witness were presented to testify by the student/parent(s), and five additional witnesses were presented by depositions. The school system presented nine witnesses to testify, including the student's two

fifth grade teachers who were also witnesses presented by the student/parent(s) by deposition. In addition to the depositions and exhibits included therein, the student/parent(s) presented thirteen exhibits and the school system presented a notebook containing seventeen exhibits.

### **TESTIMONY/EVIDENCE**

The student's mother was the first person called as a witness by Petitioner. She and her husband were co-petitioners in this proceeding and the only other child they had was the twin brother of this female student. The mother was a registered nurse and a teacher in nursing school. When her daughter entered the first grade at the city school the mother noticed that she appeared desperate in her efforts to make passing grades and worked three or four times more than her twin brother. By January in the first grade the daughter was on a kindergarten level and her twin brother was on a third grade reading level. The mother worked with her daughter studying for hours and then, because the student was still having substantial problems, the mother communicated with the teacher and requested that the student be tested. The mother also retained a private tutor, who had a masters degree in special education, to provide services for the student three days a week. The first grade teacher had thought that the student should be retained in the first grade until she saw the test results and, because she thought she understood what the problem was, she did not retain the student in the first grade. The student's testing caused the mother to contact the Center for Dyslexia where the student was tested and the mother was informed that the student needed the Wilson Learning program or some special program. The report of the Center for Dyslexia/Dyslexia Center with information about dyslexia, evaluation procedure and results regarding this child, and listing of modifications for regular classroom programs for this student was admitted as Exhibit 2 and is also an exhibit in the deposition of the director of the Dyslexia Center which is exhibit 14. This was at the end of the first grade school year and an IEP was developed for the second grade.

Exhibit 1 is the city school initial evaluation and Eligibility Report for special education services May 2002 with a reevaluation set for May 2005. It contains a total of eleven pages which show that the student has a high range of cognitive processing ability but meets the area special education learning disability with regard to reading comprehension and, because there is a severe discrepancy between her performance and grade level or ability, she needs special education.

The second grade included special education teaching pursuant to an IEP and the parents continued to provide 3 days of private tutoring until near the end of second grade when it was reduced to two days a week because the child was making some progress. The modifications for the second grade were from the Center for Dyslexia and the IEP. This continued through the third grade and by the end of the third grade the parents had reduced private tutoring to one day a week.

The city school developed IEPs for the student for the second, third and fourth grades. Near the end of the third grade the mother informed the city school special education teacher that the family was moving and the teacher filled out a form stating that the school records needed to be transferred and informed the mother that she needed to go to the school the student would be attending when they moved and request special ed records. The mother testified that she went to the county school in this Due Process proceeding, where the student has been attending school since the beginning of the fourth grade, and filled out a form requesting the student's special ed records to be sent. The request, signed by the mother and the principal of the county school, was admitted as exhibit 4 with a form from the city school stating that the student was inactive in the city school and active in the county school. She testified that the special ed teacher in the city school told her that the special records had been mailed to the county school separately from the statement that the student was inactive in the city school.

The mother testified that when she first met and spoke with the principal of the county school and informed him of the child's disability, she requested an appropriate teacher and the principal assigned the fourth grade teacher. The mother then met with the assigned 4<sup>th</sup> grade teacher and advised her of the

student's learning disability etc. After the mother told the teacher that the student had an IEP, the teacher said that they did not need an IEP because she would provide for her and the teacher provided modifications for the student as listed by the mother which were the same as the IEP. The mother and teacher met and worked together for the student throughout the fourth grade. The student did okay in the fourth grade and the mother and her tutor for the student met with the two fifth grade teachers when the student went to the fifth grade and discussed her learning disability and provided documents, including written modifications requested for the student which both fifth grade teachers agreed to. During the fifth grade the mother retained a tutor for her daughter for two to three days a week. She described the modifications by the teachers and her communications and work with teachers and tutors for the student.

The mother testified that later, while the student was in the fifth grade, a fifth grade teacher informed the mother she should get an IEP for the sixth grade because the sixth grade teachers might not provide modifications for the student unless they were required to, and the mother did request the IEP and the request resulted in this Due Process hearing.

When the mother met with a special ed person at the school system and discussed the need for an IEP for the sixth grade, the special ed person informed her that dyslexia was not recognized as a special ed disability. The mother tried to discuss the regulation provision and other information about learning disability and the Dyslexia Center and other training her daughter was being provided and the teacher stated that it was idiotic. The mother then communicated with the principal and subsequently the testing of the student was processed. The mother had to go out of state in December due to her brother's terminal cancer problems and returned in January 2006 at which time she was informed by the vice principal that the student did not meet criteria according to her IQ score. The mother had to return to her brother out of state so she contacted the State Department of Special Education and was informed by the director that the student did meet the criteria for eligibility as learning disabled. The mother then communicated with the school by mail because she was out of state. Exhibit 9A and 9B are the IQ test results that

the school told her determines that the student does not meet the requirements and an addendum thereto. She testified regarding various communications between her, the state, and the school system. The school psychologist who made the decision regarding test scores did not have access to the student's records and all the other information regarding the modification of classes, tutors, etc.

At the IEP meeting in March 2006 the mother was told by the school psychologist that the student was denied eligibility for special education because of her grades indicating that she was showing no lack of progress. When the mother told the psychologist and or psychological examiner that the success of the student was due to the teachers' modifications, they were surprised. However, the IEP team decided that the student did not meet the eligibility for special education because of her grades and no indication of lack of progress. The mother requested the Due Process hearing because she wanted the student to "benefit from education" and "succeed academically".

The mother expressed concern based upon what she said other persons had told her about the student's disability and need for modifications because the modifications in her previous school years had been why she had made progress, that the IQ which should be used would qualify her for special education, and that without modifications she would fail over time even if she studied hard and her self-esteem would suffer. She also testified about the last three weeks of school when she requested the teachers to discontinue modification and the student showed lack of progress without the modification.

The second witness was a special ed/resource teacher who was a member of the student's IEP team at the city school and remembered doing an IEP for the student. She also remembered being told by the mother at the end of the student's third grade classes that they were building a home elsewhere and would be moving to a different school the next year. The mother had completed the request for school records in July 2004 and this witness thought the special ed records were sent to the new school in July 2004. She was of the opinion that the student needed a modified curriculum and the IEP needed to be enforced.



However, on cross examination she admitted that she was not the person who sends records and that she did not have information about the student's progress since she left the city school and became a county school student.

The final five additional witnesses presented by student/parents' were by depositions, Exhibits 14-18, and the attorney for the student/parents read some excerpts from each deposition. A review of the entire deposition provides the testimony of each witness.

The first witness deposition is Exhibit 14, the May 17, 2006 deposition of a person serving as Professor in the Elementary and Special Education Department at a state university for 17 years and an official at the Dyslexia Center. The deposition was at the Dyslexia Center where they serve K-12 grade students with dyslexia in the state. The service is to supplement what is done in the student's school, not replace it, and they require evaluations and perform assessments. The Dyslexia Center first evaluated this student in March 2003 when she was an eight year old second grade student at a city school. What they diagnosed was that she exhibited the characteristics of phonological dyslexia. The Center reviewed school records and tests and her IEP and, also, information provided by the student's tutor that the parents had obtained for her. The determination in 2003 was that the student met the Tennessee criteria for eligibility for special education under "Specific Learning Disability." The witness testified that, in her opinion, the student was currently eligible for special education services under specific learning disability. When examined in 2003 it was determined that if the student did not get modifications that the Dyslexia Center recommended that the student would incur problems later and that her difficulties in school would increase over time, rather than decrease, if the student did not get appropriate instruction. This witness began evaluating the student in March 2004 when she was in the third grade and she had made progress in some areas but was experiencing significant difficulties in other areas. She was still receiving tutoring. It was the same for when the student

was in the fourth grade but she did not make progress the witness thought she should have made in school. The Center monitors children twice a year for a limited time and the last time with this student was in the fall of 2005 and the student's difficulty persisted and she was very typical of a dyslexic child. Reports for each evaluation were made exhibits to the deposition. They discussed her going into the sixth grade and the witness testified that she should be certified as learning disabled and that her teachers needed to understand her conditions and provide necessary modifications in the schooling process for development in the educational setting. The witness testified that she was familiar with school systems statewide and opined that there was room for improvement in the programming of educational opportunities for this student at the current school. The witness was of the opinion that this student's parents are highly motivated in providing for this child.

Upon cross examination of this witness by the school attorney, this witness agreed that the disability criteria includes dyslexia and that a student diagnosed with dyslexia could be determined not eligible for specific learning disability if the student did not meet the discrepancy score. The discrepancy score is comparison of the student's intelligence and skill/test results. This witness said that the original intelligence test showed 116 and the full scale indicator would be 123; however, it was pointed out that the current school system had performed a test which showed the intelligence level at 109. The witness's testimony was essentially that the child did have a disability and needed special education and related services and that providing such to the child would be in the best interest of the child and the school system. Exhibit 9 of this deposition, Exhibit 14, is the current school system's Eligibility Report March 16, 2006 determining that the student was not eligible for special education and related services and did not meet the standards for disability. The parent disagreed with the determination.

The second witness deposition is Exhibit 15, a June 7, 2006 deposition of the State Department of Education Director of Assessment Information and

Research re Special Education who had served in that position for approximately eleven years. She is involved with schools across the state regarding assessment of students relative to special education. The school system is to do testing and determine whether the student has a disability and whether the student needs special education services. The witness had a December 2005 report from the current school system and information from the parent and testified that there was enough information to identify the student with a learning disability. The student was receiving many hours of assistance at home and by special education tutoring arranged by the parents in addition to the modified curriculum the school teachers are providing as to all subjects. The student's grades are good; however, it could be the result of all the services she is receiving in addition to regular education. The witness reviewed the Dyslexia Center fifth grade report. The witness agreed that continuing the modified curriculum for the student would be good if it was benefiting her. The student's situation was different from students in general because she was receiving tutoring outside of school and spending hours at home doing homework. The witness would have used the verbal comprehensive index of 114 as the measure of cognitive ability instead of the 109 full-scale IQ score apparently used by the school system. Because she was not a member of the IEP team, this witness would not state an opinion as to whether the student was eligible for special education. Even if the school system did not certify the student as eligible for special education, the student should qualify for § 504 benefits.

Cross exam by school attorney began with inquiry about 504 eligibility and was told that eligibility was a team determination.

The third witness deposition is Exhibit 16, the July 11, 2006 deposition of a fifth grade teacher at the current school system. It is this witness's first ever deposition. She had been an educator for 23 years and was currently teaching fifth grade. She and another teacher whom she team taught the fifth grade with were both deposed by the student/parent's attorney and then called as witnesses at the Due process Hearing by the school system. The two of them were the

teachers for this student the 2005-2006 school year. This teacher testified that she only had the student for social studies and science and the other teacher had the student for more classes, including math and language arts. She remembered meeting with the student's mother the day she came to register the student and met for parent conferences. The mother had told her that the student had dyslexia and that the fourth grade teacher had made modifications for the student. This teacher discussed modifications with the fourth grade teacher and the mother and the mother made recommendations. This teacher also knew that the mother worked one-on-one a lot with the student at home and, also, obtained tutorial services almost every year the student had been in school. This teacher made modifications which included extra time for science and social studies and an EA that always read her tests aloud to her. The tests for the students may have had a reduced number of questions, she always was given extra time, and grading would avoid obvious spelling errors and things of that sort. The student was provided extra sets of texts at home and she was also provided tapes on books. The teacher knew that the student had been in the city school system for grades first through third but did not know she had an IEP. The county school system had not received the special ed records until almost the end of the fifth grade and this teacher had not looked at any IEP reports from the grades first through third. This teacher then reviewed the third grade IEP and testified that the provisions of the IEP were essentially the same modifications/services that she was providing the student in the fifth grade. The teacher was asked by the mother not to modify the student's curriculum for three weeks as an experiment and the student had more difficulty and made poorer grades during that time. This teacher testified that she did not think the student should be certified as eligible for special education because if they modify her work she can make passing grades. This teacher thinks that the modification for the student has resulted in the student's academic progress and that modification is essential for her educational needs. There is a REEVALUATION SUMMARY REPORT dated December 6, 2005 and it contains an IEP TEAM REEVALUATION DECISION which includes statements that "this student

continues to demonstrate the characteristics of a student with an educational disability” and “the student continues to need special education and/or related services” and included a statement that additional assessment need was agreed to by the parent.(Exhibit 3 to deposition Exhibit 16).

When called as a witness by the school system at the Due Process Hearing, this teacher testified that she had been a fifth grade teacher at the county school for nine of her twentythree teaching years and this student was in her class last year. She said that it is a general practice in her class to provide modification for students to help the student regardless of their special ed status and she described the modifications provided for this student last year.

The fourth witness deposition is Exhibit 17, the July 11, 2006 Deposition of the second member of the two team teachers for this student in the fifth grade. She had never given a deposition before. She had been a teacher for six years and she was the fifth grade teacher for this student in math, reading, language, and spelling. She remembered meeting with the student’s mother and being told about the student’s dyslexia and the mother providing her a list of recommendations from the Center of Dyslexia for the student. This teacher did provide modifications for the student. She believes that the student does need modifications, that modifications do improve her capability and performance in school, and she believes modifications will be provided by teachers even if the student is not certified as eligible for special education.

When this teacher was later called as a witness at the Due Process Hearing by the school system, she described the student as a good person who was motivated and did what the teacher asked her to do. Her testimony included the modifications she made for the student and review of the REEVALUATION SUMMARY REPORT dated December 6, 2005 and IEP TEAM REEVALUATION DECISION stating that “this student continues to demonstrate the characteristics of a student with an educational disability” and “the student continues to need special education and/or related services” and she admitted being one of the team that agreed to and signed these statements although she testified she did

not know the student had ever been certified as a special ed student and received an IEP.

The fifth witness deposition is Exhibit 18, the July 20, 2006 Deposition of one of the tutors the parents had provided for this student. She had a masters degree in special education, had taught as a special ed teacher for eight years, left teaching when she became a mother and began serving as a tutor for about five or six years. She had started tutoring this student in January 2002 at the request of the student's mother when the student was still in the first grade and because she was struggling. It was at the end of the first grade that the student was certified as having a learning disability. After she began tutoring the student, the student was examined and serviced by the Dyslexia Center and she worked with the Center's recommendations and the student's school teachers to provide tutoring that would help the student's school performance while in the city school in first through third grades. When the student started the fourth grade and had changed to the county school system, the tutor met with the fourth grade teacher and talked about the student being dyslexic, having learning disability, needing modifications, and communicating with the teacher so that tutoring could benefit the student at school. She thought that the special ed file would be received by the county school and special education needs and IEP would be taken care of by the school. The fourth grade teacher agreed to provide all the modifications requested. At about the end of the fourth grade, the tutor informed the mother that she would no longer be serving as a tutor for the student because of her birth of another child. The tutor met with the student's two fifth grade teachers and discussed the student's dyslexia, reading disability, special ed certification, IEP, and modifications included in the previous IEPs which she recommended and the teachers agreed to provide. The student's teachers all had been agreeable and provided the student with her needs. There then became some concern about the sixth grade process discussed by the parent and tutor and fifth grade teachers because the student would have six individual teachers in the sixth grade and it was determined that there should be something in writing so all

the teachers would know what was needed, be required to provide it, and all the teachers would work together for the student. This was needed because the modification provided the student in the second through fifth grades had considerably helped the student be successful in the education process and the tutor was of the opinion that she would not have succeeded without the modifications. She is of the opinion that without modifications, the student's educational performance would gradually decline and eventually result in a class failure. She testified that she thinks certification for special education is critical for this student's success in the public school system.

The nine witnesses presented by the school system, including the two fifth grade teachers that had been presented by the student/parents, began with one of the fifth grade teachers.

The second witness was the county school system's Special Education Coordinator who was serving in that position for the fifth year. She had also served as Compliance Liason for the system, as a general ed teacher for about seven years, and as a special ed teacher for about seven or eight years. She was asked a few questions about the system's school psychologists.

The third witness was the assistant principal at the student's school who also had a teaching history including special education. The school said it only received the school records in May this year for this student from her previous school although she had been at this school for two years. She thought the mother had requested an IEP meeting and, because the date for reevaluation of the student had passed, a reevaluation was conducted and then an IEP team meeting was conducted to determine eligibility. She was questioned about the IEP TEAM REEVALUATION DECISION stating that "this student continues to demonstrate the characteristics of a student with an educational disability", "the student continues to need special education and/or related services", and "the previous disability continues to be accurate", which was signed December 6,

2005 by six IEP team members including the two sixth grade teachers and mother. She testified that was the basis for the additional assessment and that without those findings that the reevaluation would not have continued. She testified that the testing was conducted and that at the second IEP team meeting it was determined that the student did not qualify for special ed services which she, as an IEP team member, agreed with. She testified that all students learn differently and have to be taught differently so the teachers teach both special and non-special ed students differently. She also testified that the IEP team discussed that modifications would continue to be made for this student when it determined that the student was not eligible for special education services. She testified that, for this student, she would meet with the student's fifth grade teachers and the sixth grade teachers after they were assigned and would discuss what modifications are needed and will be provided for the student. She testified that they would serve as a professional team to determine what modifications the student needs to have. The witness testified that the student did not qualify for special education under the state guidelines because she did not have 23 points discrepancy or the points required for the regression formula. The witness also testified that her professional opinion was that this student did not meet the criteria to qualify under 504.

The fourth witness was a school system employee whose responsibilities include initiating evaluations and reevaluations for special ed students. In October 2005 she communicated with the student's mother and obtained paperwork which she reviewed and got the school psychologist to initiate the reevaluation process. Because the testing did not show a discrepancy, the IEP team determined that the student was not eligible for any special education services and the mother disagreed. The testing did not show a 23 point difference in the IQ and achievement tests so the student did not qualify as learning disabled. The witness then testified as follows:



We felt – also, the second part of the evaluation decision is made whether or not there needs can be met in the regular classroom without special ed intervention. And at that point we were offering (student) special ed intervention, and she chose not to accept it in the regular classroom. So we felt then that her needs were being met in the regular classroom without our intervention. So that, coupled with the not meeting the guidelines as far as the test scores go, then compelled us to say that we did not think she needed services.

The witness testified that the 23 points was two standard deviations below the student's IQ and that was the current criteria. She testified that the old criteria would have been 16 points. She also testified that she thought this student had not been receiving modified curriculum and that she had only been receiving modified grading. When asked about some of the specific modifications the sixth grade teachers had testified about, this witness agreed it was modified curriculum. The witness also testified that the handicapping condition that dyslexia may fall under is learning disabilities.

The fifth witness presented by the school system was the second sixth grade teacher who the student/parents presented by deposition.

The sixth witness was a county school system Assessment Specialist who had done achievement testing for about four years after teaching approximately seventeen years. She performed an achievement test of this student and the results are school system's exhibit 6. The witness testified that all scores are in the average range. On cross examination the witness admitted that specific subtests showed third grade equivalency for Word Attack, Spelling, Passage Comprehension and Basic Reading Skills, and forth grade level for Broad Reading and Academic Skills. The witness testified that individual subtests are calculated with other test scores to come up with "Broad" scores which are considered instead of the individual tests.

The seventh witness was a school psychologist who had served in that position for eighteen years and served as a psychological examiner to assess students to determine if they qualify for special ed services. She and others administered tests on this student, including an IQ test and achievement tests, and reported the results with the conclusion that she did not qualify as learning disabled. Her report was admitted as school system's exhibit 5. She testified that she used the Full Scale IQ score of 109 to compare with other test results and a score of 90 would have been required for certification as learning disabled under the guidelines. She also admitted that she had written on her report that the student's "Full Scale IQ score may not be the best predictor of her current level of intellectual abilities " but that was the IQ score she used for test comparison. The student had made good school grades this year and was therefore not qualified for special education. The witness testified that she was "not aware of the modifications made for her this year." The witness testified that dyslexia was not mentioned in the state special ed guidelines; after having read the guideline definition of Specific Learning Disabilities, she admitted that dyslexia was included. The witness testified that:

“ – the assistant principal said to the mother, 'I guarantee you that the next school year (student's) teachers will modify for her academically if she needs it. If she needs the modifications, we will be happy to modify for her.' And the assistant principal said, 'And it is my responsibility to see that they modify, and I am here to tell you it will be done.' And (the mother) said, 'That's not good enough.' “

Review of various documents and statements of other persons by this witness during examination by both attorneys, and the testimony that this witness is aware that the Professor at the Dyslexia Center and the State Department of Education Director of Assessment Information and Research re Special Education were of the opinion that the student met the guidelines for special education, did not affect her opinion that this student did not meet the guidelines for eligibility.

The eighth witness was a school psychologist at the county school system who is involved with testing of students and, also, makes determinations regarding special education eligibility. She testified that it was her opinion that this student's Full Scale IQ score would be the best measure of cognitive ability for eligibility determination. She had never met this student or seen her in class and was not aware of much information about her, including the classroom modifications. She agreed that in determining eligibility you should consider everything about the student; however, the main thing she said they looked at was that nothing affected this student's grades. She agreed that she would have looked at it differently if the teachers had terminated modification and the student's grades dropped but she did not know if it would have changed her opinion.

The ninth and final witness presented by the school system was the county school system's lead psychologist. She had consulted with the school psychologist who was involved in testing of this student and had reviewed her report. It was her opinion that this student's Full Scale IQ score should be used for eligibility determination and she disagreed with suggestion of others that a different score be used. She agreed with the determination that this student did not meet the criteria for being learning disabled. She had not met the student, talked with the student's teachers, and did not have much information about the student other than certain test results.

## **DISCUSSION**

Federal statute 20 U.S.C. § 1401 defines "child with a disability" as a child with health impairment or specific learning disability "who, by reason thereof, needs special education and related services." 20 U.S.C. §1401(3)(A). It also defines "specific learning disability" as a "disorder" and the condition of "dyslexia" is specifically included as such "disorder". 20 U.S.C. § 1401 (30)(A) and(B). IDEA regulation 34 C.F.R. 300.7 and Tennessee Board of Education Rules 0520-1-9-

.01 (8) and (15)(m) provide essentially the same definitions with dyslexia included as a “specific learning disability.”

Federal statute 20 U.S.C. § 1414(d)(2) provides that an IEP is to be in effect at the beginning of each school year for a child with a disability and, that if the child with an IEP transfers to another school in the same state then the IEP services shall be provided until the new school adopts the IEP or develops an new IEP. The same statute provides that the new school “shall take reasonable steps to promptly obtain the child’s records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous school in which the child was enrolled. . .” and that “the previous school in which the child was enrolled shall take reasonable steps to promptly respond to such request from the new school.” 20 U.S.C. §1414(d)(2)©(ii). IDEA regulation 34 C.F.R. 300.342 provides that an IEP is to be in effect at the beginning of the school year and is to be in effect before special education and related services are provided to an eligible child.

This student had problems in school before she was initially provided special education services. Since being provided such services by school systems, together with the time and services provided by her parents, she has apparently not continued to have the problems and has done okay. The student began school in the first grade at a city elementary school and, because she had problems, the school system and parents determined that the student needed to be evaluated with regard to special education. She was evaluated near the end of the first grade year and determined to be eligible for special education and an IEP was developed for the second grade. Also, the parent(s) provided extensive individual assistance and personally obtained tutorial services to aid their child. Due to the special ed services, and presumably the parental assistance and tutorial services, the student did better in the second grade and an IEP was developed for the 3<sup>rd</sup> grade. The student did well in the third grade due to the special ed services and presumably the parental assistance and tutorial services. An IEP was developed for the fourth grade. However, the family moved their residence and the student began attending this county elementary school at the beginning of the 4<sup>th</sup> grade. It

is questionable and disputed as to when the county school system received the student's city school records, including special education records, and the student was not identified as a special education student at the county elementary school and no IEP was formally in effect. The IDEA requirement for providing special ed for a student who changes school when an IEP is in effect was not formally complied with regarding this student; however, because the mother and others met with the teachers at the beginning of, and/or before and during, the school year and the teachers received information and modified the student's education services and requirements, the student did well enough, even if not the best that she could have done, during both the 4<sup>th</sup> and 5<sup>th</sup> grades. At this school, the fourth grade teacher and parent agreed that paperwork for special education was not necessary because the teacher agreed to provide all the modifications/services set forth in the IEP developed at the city school and did so provide for the student who did okay during the fourth grade. The situation was the same in the fifth grade because the two teachers worked with the parents and others and provided all modifications needed for the student and the student did okay for the fifth grade. The student's doing well enough in these two grades is probably also a result of the parent(s) continued providing of tutorial service for the student during the 4<sup>th</sup> and 5<sup>th</sup> grades and the student's receipt of any services or other benefits from the Dyslexia Center and her parents.

This student's doing academically okay in school is obviously related to the modification of school services. When the parent learned that it might be necessary to obtain special education services to provide the needed services for the student in the sixth grade and requested the fifth grade teachers to terminate the modifications to see if it would affect the student, the student did significantly worse during the brief period that the modifications were not in effect. Although she has not been certified as eligible for special education and provided an IEP by the current school system, the current school system apparently has provided essentially the same modifications and/or services specified in the IEP for the fourth grade by her previous school which she left after the third grade. Those modifications and/or services have been provided during both the 4<sup>th</sup> and 5<sup>th</sup>

grade classes so that she did not need to be certified as eligible for special education and provided an IEP which was agreed to by the parent(s). It is clear that she does have a specific learning disability and the question is whether, because of the specific learning disability, she needs special education and related services. She does need modifications and variances in the regular class and testimony appears to indicate that she may be eligible for 504 benefits even if she is not eligible for an IDEA special education IEP. Both the IDEA and Section 504 require Free Appropriate Public Education (FAPE) be provided to students with disabilities. According to the Office of Special Education Programs (OSEP), the most significant difference between FAPE requirements under Section 504 and those of the IDEA is that IDEA defines FAPE as consisting of special education and related services implemented on the basis of an IEP document and 504 says FAPE may consist of either general or special education and related aids and services as implemented by any appropriate means, including, but not limited to, an IEP.

It does appear that during the 5<sup>th</sup> grade the parent(s) was told by someone that the student needed to be certified for special ed before she went to the 6<sup>th</sup> grade because she would have 6 teachers and modification of the student's educational program would likely not be provided by all teachers unless there was such a requirement provided by a special ed IEP.

However, after the parents' request for an IEP, an IEP team did meet and decided that testing for reevaluation was needed. And, after reevaluation testing, the IEP team met again and determined that the student was not eligible for special education. The school system maintains that any needed modifications will be provided for the student in the regular classroom.

The student does have dyslexia which is a learning disability; however, she does have at least an average IQ and a good attitude and a desire to do well in school. Due to the nature of the student, the assistance provided by her parents, tutors, the Dyslexia Center, and her first school and all teachers, including the fourth and fifth grade teachers at the current school, she has been able to make progress in her education.

However, there is no question that this student will suffer and not do well in the education programs if her teachers do not provide her with modification and services that she needs probably at every grade and in every class. It was in the first grade when she might have been retained except it was determined that her problem was a learning disability and special education and related services were developed and provided to accommodate her needs.

With regard to the determination of this student's eligibility for special education and related services, there is a conflict in opinions about using the test results with the student's specific IQ score. All school system witnesses agree to use of the IQ score that determines that the student does not qualify as eligible for special education and the Dyslexia Center witness and State Department of Education witness are of the opinion that a different IQ score should be used and could possibly determine that the student does qualify as eligible for special education.

There was a conflict in testimony regarding whether the fifth grade teachers stated at the IEP determination meeting that they did not agree that the student was not eligible for special education. The mother testified that they did so state disagreement at the IEP meeting; however, at the IEP team meeting they did sign the document that they agreed the student was not eligible and they did not admit stating disagreement when questioned during depositions and at the Due Process hearing. So, even if they did tell the mother that they disagreed, their signatures and subsequent testimony indicate that their opinions changed.

The student has done okay in the fourth and fifth grades at the county school system because of the modifications and services provided by the teachers to meet the needs of this individual student along with all services provided and obtained by the parents. The reason the Due Process Hearing was requested was because the mother was informed that such accommodations would probably not be provided the student in the sixth grade.

The school system says that the only issue is eligibility for special education and that the IEP team properly determined that this student was not

eligible at the time of the IEP determination. The school system maintains that it has been providing, and will continue to provide, modifications, interventions, and all kinds of techniques necessary to meet the needs of the student in the regular classroom, and the school system admits the student does have needs.

### **FINDINGS of FACT AND CONCLUSIONS of LAW**

Based upon the preponderance of evidence presented at the Due Process Hearing in this proceeding and the applicable law, it is found as follows:

1. The goal of IDEA is for the student to be the focal point and for the school system and the parents to work together for the benefit of the student. It does appear that this school system and the parents have worked together for the benefit of this student; however, the student's situation has been different from students in general because she has been receiving tutoring outside of school and spending hours at home doing homework.

2. It is clear that this student does have a disability and needs some services and modifications in the regular classroom; however, for some reason this school system and the parents have worked together to provide this student with needed services and modifications during the 4<sup>th</sup> and 5<sup>th</sup> grades without certifying the student eligible for special ed benefits and creating an IEP to specifically provide for the student's needs. This is a good student who desires to do well, works to do well, and will do well if she is provided with the services necessary to facilitate her education and future employment and independent living.

3. Beginning when the student enrolled in this school system, the parent(s) agreed with the county school system that the student not be certified as eligible for special education and not be provided an IEP in the 4<sup>th</sup> grade and then agreed to the same for the 5<sup>th</sup> grade. However, because of the parents' concern about the student's education and whether the school would continue to provide necessary and appropriate services beginning in the 6<sup>th</sup> grade, the



parents requested an IEP be created to ensure that the necessary and appropriate services would continue to be provided.

4. An appropriate IEP team was developed and determined that reevaluation testing needed to be performed. Testing was performed and the IEP team considered all results and other information that should have been considered and the IEP team determined that the student did not qualify as eligible for special education and did not need special education services because of how she had performed and succeeded in the 4<sup>th</sup> and 5<sup>th</sup> grades.

5. The school system has provided this student specialized assistance without certifying her as eligible for special education. The student is apparently fully included in the regular classroom and, even though not specified as eligible for special education, has been provided the services determined to be necessary by the IEP team at her previous school.

6. An identified disability does not, by itself, entitle a student to special education services. The student must also be in need of special education services because of that disability.

7. A section of IDEA, 20 U.S.C. §1414, with an entitlement including “Evaluations” and “Eligibility Determinations”, describes initial evaluations and reevaluations and includes determination by the IEP team as part of reevaluation “whether the child continues to have such a disability and such educational needs” and “whether the child continues to need special education and related services”. 20 U.S.C. §1414(c)(1)(B)(i) and (iii).

8. The IEP team was composed of appropriate members and engaged in appropriate activities and consideration of all relevant information available in determining whether the student was eligible for special education services at the beginning of the 6<sup>th</sup> grade.

9. The evidence failed to prove that, under applicable law, the student is in need of special education services because of her learning disability. With the instructional modifications provided by the school system, the student has been receiving beneficial education in her regular education program.

10. The Hearing Officer concludes that the evaluation test reports and testimony presented at the hearing indicate that the student did not qualify as eligible for special education and that this student has received sufficient educational benefit in her regular education program in the 4<sup>th</sup> and 5<sup>th</sup> grades after the parent(s) agreed with the school not to qualify the student as eligible for special education and not to provide an IEP for her in those two grades. Therefore, the school system's determination that the student has not demonstrated a need for special education services is supported by the preponderance of evidence.

11. Reliance of a school system on a student's performance/academic achievement alone to determine eligibility for special education has been determined to be improper. Elida Local School Dist. Bd. Of Ed. v. Erickson, 252 F.Supp2d 476 (N.D. Ohio 2003); however, evidence indicates that the student's performance was not the only basis for the IEP team's determination which was based upon consideration of various information, including evaluation test reports that the student was not eligible at the time of the testing.

12. Although this student had previously been identified as a "child with a disability" because she was a student with dyslexia and needed special education and related services, the regular education academic interventions provided by her teachers in the 4<sup>th</sup> and 5<sup>th</sup> grades were successful and she thereafter met the school system's academic standards for the school year. However, the student's grade points in the 5<sup>th</sup> grade did go down lower than her grades in the 4<sup>th</sup> grade in five of her six subjects and remained the same in one subject. Also, the three areas she was rated with excelling achievement in the 4<sup>th</sup> grade were all rated with only satisfactory achievement in the 5<sup>th</sup> grade.

13. This order is not a decision with regard to the student's future. It only is a decision as to the acceptability of the IEP team determination that the student was not eligible for special education services when she began the 6<sup>th</sup> grade. It is important that the school system and the parents do work together for the benefit of the student and it is possible that the student will develop a need for special education services and an IEP team can develop an appropriate IEP.

14. It is not known what services have been provided by the school system or what the student's academic achievement and functional performance has been since the beginning of the sixth grade. If the student has not been provided necessary modifications in the regular classroom and/or has not continued appropriate academic achievement as a result of modifications provided by the school system as were provided by this school system in the 4th and 5th grade classes instead of special ed IEPs as provided in the previous school in grades second and third, there may need to be a full determination of eligibility for special education and related services and may be requested by a teacher or parent. If the parents are not satisfied with the results of testing performed by the school system, consideration of requesting an independent educational evaluation (IEE) as provided by Tennessee Board of Education Rule 0520-1-9-.14 (6) may be appropriate. Also, if the 6<sup>th</sup> grade or any future grade is not satisfactory for the student's needs, a future IEP team may consider an assessment of the student's needs and providing compensatory services to elevate the student to the position she would have occupied if FAPE had been provided when the school system determined she needed modifications but not special education and related services.

### **ORDER**

It is, hereby, ORDERED that, based upon the evidence presented, the applicable law, and the findings of the administrative law judge, it is hereby ordered that the parents are not entitled to the relief sought.

Entered this 28th day of December, 2006.

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JACK E. SEAMAN (4058)  
ADMINISTRATIVE LAW JUDGE  
2021 Richard Jones Road, Suite 350  
Nashville, Tennessee 37215-2874  
615/383-3332

## **NOTICE**

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County or in the county in which the petitioner resides or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing document has been sent by U.S. Mail to the following on this 28 day of December, 2006:

Phillip M. George, Esq.  
P.O. Box 467  
511 Enon Springs Road, East  
Hamilton Place  
Smyrna, TN 37167  
**Attorney for Student/Parents**

Angel McCloud, Esq.  
2240 Southpark Blvd..  
Murfreesboro, TN 37128  
**Attorney for School System**

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JACK E. SEAMAN

cc: Bill Wilson, Esq., Legal Consultant  
Tennessee Department of Education  
Division of Special Education  
5th Floor, Andrew Johnson Tower  
710 James Robertson Parkway  
Nashville, Tennessee 37243-0380

performed. Testing was performed and the IEP team considered all results and other information that should have been considered and the IEP team determined that the student did not qualify as eligible for special education and did not need special education services. The school system maintained that any needed modifications would be provided for the student in the regular classroom.

Because, based upon the evidence presented, the applicable law, and the findings of the administrative law judge, the evidence failed to prove that the student is in need of special education services because of her learning disability. it was ordered that the parents are not entitled to the relief sought.

This final order is not a decision with regard to the student's future. It only is a decision as to the acceptability of the IEP team determination that the student was not eligible for special education services when she began the 6<sup>th</sup> grade.